89-729

No. ——

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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TOM ABBOTT, *et al.*,
*Petitioners,*

v.

THE CITY OF VIRGINIA BEACH,
*Respondent.*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 88-2958

TOM ABBOTT, individually, as President of the Virginia Beach Policemen's Benevolent Association, and as FLSA Representative of Plaintiffs, et al.
*Plaintiff-Appellant,*

v.

THE CITY OF VIRGINIA BEACH
*Defendant-Appellee.*

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CA-87-885-N)

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Argued: May 11, 1989 Decided: July 19, 1989

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Before WILKINS, Circuit Judge, HAYNSWORTH, Senior Circuit Judge, and TURK, Chief United States District Judge for the Western District of Virginia, sitting by designation.

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Michael Tarcissius Leibig (Joseph E. Slater, ZWERDLING, PAUL, LEIBIG, KAHN & THOMPSON, P.C.;

Kenneth W. Stolle on brief) for Appellant. Randall Mahlon Blow, Assistant City Attorney (J. Dale Bimson, City Attorney on brief) for Appellee.

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WILKINS, Circuit Judge:

The Virginia Beach Policemen's Benevolent Association, its current and past presidents, the Virginia Beach Police Sergeants Association, its current president, and 126 individual Virginia Beach policemen (collectively, the Policemen) appeal from the grant of partial summary judgment in favor of the City of Virginia Beach on their claims for violation of the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C.A. §§ 201, *et seq.* (West 1978 & Supp. 1989). We affirm.

I.

From April 1, 1986 through January 21, 1988, the Virginia Beach Police Department (the Department) provided compensation to its officers for overtime at a rate of one and one-half times their regular pay rate as required by the FLSA, 29 U.S.C.A. § 207(a)(2). Pursuant to Department policy, each officer had the choice of receiving his overtime compensation in money or compensatory leave, or any combination thereof.[1] Thus, if an employee worked four hours overtime one day, he could elect to receive four hours overtime pay or four hours compensatory leave or any combination he chose. If the employee worked four hours overtime the next day, he could again make any election he chose. The officer exercised his option after each occasion of working overtime by submitting an Overtime and Leave Request form.

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[1] As of January 21, 1988, the Department changed its policy to compensate all overtime in money. The Policemen do not challenge the current policy.

On each occasion the employee's choice would be automatically honored by the Department.

The Policemen instituted this action claiming that the previous policy violated the FLSA, 29 U.S.C.A. § 207(o), because the Department refused to negotiate an agreement with their designated FLSA representatives[2] and promulgated the policy unilaterally. They sought a monetary award in exchange for their accrued compensatory leave and an equal amount as liquidated damages for alleged willful violation of the Act.[3] The district court granted partial summary judgment to the City holding that the policy complied with the FLSA. *Abbott v. City of Virginia Beach*, 689 F. Supp. 600 (E.D.Va. 1988).

## II.

As originally enacted, the FLSA was not applicable to state or local public employers. Congress later attempted to subject almost all state and local public agencies to the overtime and minimum wage requirements of the FLSA. However, the Supreme Court held that the requirements could not be enforced against public employers where traditional government functions were involved. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976). In 1985 the Court overruled *Usery*, holding that Congress was not limited by the nature of the work in requiring public employers to comply with the FLSA. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985).

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[2] Tom Abbott, president of the Benevolent Association, Nicholas Sitarski, president of the Sergeants Association, and Frank LaPorta, past president of the Benevolent Association, were designated as alternate FLSA representatives by 253 individual Virginia Beach policemen.

[3] At oral argument, counsel for the Policemen indicated that if the court remanded the case, they would also seek a monetary award for compensatory leave which had already been utilized.

After *Garcia* was decided, Congress amended the FLSA to enable public agencies to implement compensatory leave policies in lieu of monetary payments for overtime. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(a), 99 Stat. 787 (1985) (added 29 U.S.C.A. § 207(o)). The amendment provides:

> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> > (A) pursuant to—
> >
> > (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
> >
> > (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C.A. § 207(o).

Virginia law prohibits the Department from collectively bargaining with representatives of its employees. *Commonwealth v. County Bd. of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977). Consequently the Policemen do not have a collective bargaining agreement with the Department. Nevertheless, the Policemen chal-

lenged the Department policy on the ground that the Department did not reach an agreement with their designated employee representatives prior to promulgating the policy. The district court held that a subclause (i) agreement is "only required where state law permits state and local governmental entities to recognize representatives of their employees for collective bargaining purposes." 689 F. Supp. at 603. The court concluded that the Department policy complied with section 207(o) since Virginia law prohibited the Department from entering into an agreement with its employees collectively. *Id.* at 604.

The Policemen contend that the district court erred in interpreting the term "representatives" to mean only recognized bargaining agents. They assert that any designee of the employees is a representative, whether recognized or not, and that if public employees designate a representative, compensatory leave cannot be provided in lieu of cash for overtime unless an agreement is reached with the representative. They further assert that if a designation is made and the employer refuses to deal with the representative, the employer cannot reach individual agreements with the employees who made the designation—it must provide cash payment. According to the Policemen, the employee representative acts for only those officers who designate him and only for as long as they choose. In the Policemen's view, the Department may enter into individual agreements with the officers who do not designate a representative and any officer may withdraw his designation and contract individually with the Department at any time. Thus, the Policemen take the position that in order to utilize compensatory leave, the Department should be required to reach an agreement with a designated representative and be bound by the agreement while an officer who designated a representative could unilaterally opt out of the agreement if he became dissatisfied.

## III.

The question here is whether section 207(o) permits public employers to enter into individual agreements with its employees to provide compensatory leave in lieu of money for overtime where state law prohibits the employer from entering into agreements with employee representatives. In construing section 207(o), the principal function of the court is to effectuate congressional intent. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). This is a difficult task since the statute does not define the term "representatives," legislative history is contradictory, and administrative commentary is confusing. However, after considering all pertinent factors, we conclude that the district court properly interpreted the statute as allowing public employers to enter into individual overtime compensation agreements with individual employees where state law prohibits the agency from entering into agreements with employee representatives.

### A.

The first step in construing legislative intent is to examine the statutory language. *Blum v. Stenson*, 465 U.S. 886, 896 (1984). However, since section 207 does not define "representatives," consideration must be given to "the authoritative source" for determining legislative intent—"the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Also, the regulations promulgated by the Department of Labor are entitled to respect. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981).

Here, although the language of both the House and Senate bills tracks the language of subclause (i) ver-

batim, different views of its meaning are expressed. In explaining the provision, the House Report provides: "Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer. . . ." H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985). In contrast, the Senate Report states: "Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee." S. Rep. No. 159, 99th Cong., 1st Sess. 10 (1985). The Conference Report did not address this issue. H.R. Rep. No. 357, 99th Cong., 1st Sess. (1985).

The Secretary of Labor, pursuant to the mandate of Congress, promulgated regulations implementing the statute. 29 C.F.R. Part 553 (1988). These regulations provide, in pertinent part: "In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1). The Discussion of Major Comments accompanying promulgation of the final regulations indicates that the issue now before the court was considered by the Secretary. Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed. Reg. 2012 (1987).

Commentators had expressed concern that section 553.23(b)(1) would conflict with state laws, such as in Virginia, which do not require, or actually prohibit, recognition of collective bargaining agents. *Id.* at 2014. In response to this concern, the Secretary stated:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a [collective bargaining agreement], memorandum of understanding or other agreement be reached be-

> tween the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices.

*Id.* at 2014-15. Thus, while the Secretary followed the House position that an agreement must be reached between an employer and a representative of the employees where a representative has been designated—whether recognized or not—he also expressed intent not to preempt state law.

The Policemen also presented a letter from the congressional sponsors of the bill to the Secretary of Labor after passage of section 207(o). The congressional members indicated support for the Secretary's section 553.23(b) of the regulations, as "properly reflect[ing] the language and the intent of the new law." However, these *post hoc* statements are entitled to little weight, *see Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), particularly since the Secretary's regulation adopts the House position without resolving the conflict between the express intent of both chambers of Congress.

B.

The district court relied upon the Senate Report in concluding that Congress intended subclause (i) to apply only where state law permits employees of state and local governmental entities to have recognized representatives. 689 F. Supp. at 602. The court did not consider the House Report and rejected the Secretary's regulation as contrary to the Senate Report. *Id.* at 603. While the district court should have considered the House Report

as well as the Senate Report, it reached the proper conclusion in any event. The district court also properly declined to follow the holdings of other courts which adhered to the regulation, for those cases are distinguishable in several key aspects. *Dillard v. Harris*, 695 F. Supp. 565 (N.D.Ga. 1987); *Jacksonville Professional Fire Fighters Ass'n Local 1296 v. Jacksonville*, 685 F. Supp. 513 (E.D.N.C. 1987). *See also Int'l Ass'n of Fire Fighters Local 2203 v. West Adams County Fire Protection Dist.*, No. 87-F-16 (D. Colo. Mar. 18, 1988), *aff'd*, —— F.2d ——, No. 88-1691 (10th Cir. June 9, 1989); *Bleakly v. City of Aurora*, 679 F. Supp. 1008 (D. Colo. 1988); *Wilson v. City of Charlotte*, No. C-C-88-79-P (W.D.N.C. Nov. 20, 1988). Most importantly, they did not involve a situation where, as here, a public employer, who was prohibited by state law from contracting with employee representatives, gave each employee an absolute choice of whether to accept compensatory leave in lieu of money.[4]

Beneath the conflicting and confusing rhetoric of the administrative and legislative history, several matters are clear. The Secretary expressly declined to preempt state laws regarding labor relations between public employers and employees. And, the House Report stated that the purpose of section 207(o) was "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985).

The Department policy fulfilled the central purposes of section 207(o). The policy allowed the Department some flexibility in dealing with overtime compensation and pro-

---

[4] In the Colorado cases, there were no assertions by the public employers that they were prohibited by state law from contracting with the employee representatives. And, in the North Carolina and Georgia cases, the employer retained the sole discretion on whether to provide compensatory leave or money for overtime.

vided the individual Policemen not only an "element of choice," but an *absolute* choice in electing compensatory leave, money, or any combination thereof each time they worked overtime.

In the final analysis, the district court holding that public employers may enter into these types of individual agreements with its employees where state law prohibits agreements with employee representatives sustains state law and under the circumstances here, effectuates fairness, flexibility and choice.

*Affirmed.*

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*,
*Plaintiffs,*

v.

THE CITY OF VIRGINIA BEACH,
*Defendant.*

### ORDER

This action was brought for alleged violations of the amended Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Plaintiffs are the Virginia Beach Policemen's Benevolent Association ("VBPBA"); the Virginia Beach Police Sergeant's Association ("VBPSA"); Tom Abbott and Frank LaPorta, the current and past presidents of VBPBA, and Nicholas Sitarski, the current president of VBPSA, in their individual and organizational capacities and in their capacities as "FLSA Representatives"; and one hundred twenty-six other individual Virginia Beach police officers. The sole defendant is the City of Virginia Beach (the "City"). Plaintiffs seek, among other things, declaratory relief under 28 U.S.C. § 2201 and compensatory and liquidated damages under 28 U.S.C. § 216(b).

On June 3, 1988, plaintiffs moved this Court for summary judgment pursuant to Federal Rule of Civil Procedure 56(a). On June 7, 1988, the City moved for partial summary judgment pursuant to Rule 56(b) on the issue of whether its practices violated 29 U.S.C. § 207(o)(2)(A). On June 13, 1988, plaintiffs submitted a reply

brief in which they state that all of the City's alleged FLSA violations had been corrected with the exception of its alleged violation of Section 207(o)(2)(A). Accordingly, this issue is ripe for disposition.

The facts material to resolving this issue are not in dispute. The individual plaintiffs are employees of the City. The City is a municipal corporation organized and operating under Virginia law and a public agency within the meaning of Section 207(o)(1). The Virginia Beach Police Department (the "Police Department") is the law-enforcement agency of the City. Collectively, Abbott, LaPorta and Sitarski (both individually and through the VBPBA and VBPSA) are the designated "FLSA Representatives" for 253 of the between 400 and 500 officers in the Police Department. Some of the 253 police officers are also individual plaintiffs.

On April 1, 1986, the City, through the Police Department, instituted a policy concerning officer overtime pay which continued until January 21, 1988. As required by 29 U.S.C. § 207(a)(2), an officer was paid for any time worked over forty hours a week at a rate one and a half times his regular pay rate. Each time an officer worked overtime, he was given the choice of whether to take his vacation pay in compensatory time or money. He indicated his choice by completing a "Form P.D. 130-2" and submitting it to his immediate supervisors at the end of his shift. The City's policy was to honor an officer's choice, and there is no evidence that a Form P.D. 130-2 request was ever denied.

The City adopted this policy of its own accord instead of by agreement with Abbott, LaPorta and Sitarski. No meetings were held between the City and these plaintiffs, although the City did offer to meet with them to discuss their individual problems and concerns.

On January 21, 1988, the City, through the Police Department, promulgated its present policy of paying all overtime in money.

Section 207(o) provides in part:

> (1) Employees of a public agency which is a State, a political subidivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hour for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . .

29 U.S.C. § 207(o) (1985 Supp. III). The parties agree that the City's policy since January 21, 1988 is in compliance with Section 207(o)(2)(A). They disagree, though, over whether the City's policy from April 1, 1986 to January 21, 1988 complied with Section 207(o)(2)(A). Plaintiffs contend that since 253 Virginia Beach police officers were represented by Abbott, LaPorta and Sitarski, Section 207(o)(2)(A)(i) required that the City enter into an agreement with these plaintiffs rather than each of the 253 officers individually concerning the use of compensatory time as pay for overtime. The City takes the position that because Virginia law prohibits

it from collectively bargaining with representatives of its employees, *see Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977), it was required to comply with Section 207(o)(2)(A)(ii), which it did by implementing a policy of allowing police officers to individually choose to take overtime pay in compensatory time or money.

The issue comes down to whether Abbott, LaPorta and Sitarski needed to be "recognized" representatives in order to make a Section 207(o)(2)(A)(i) agreement. "Recognition", as that term is understood in the context of the National Labor Relations Act, the Taft-Hartley amendments and labor law in general, means the acknowledgment by an employer that a collective-bargaining representative has been designated by a majority of employees in the appropriate bargaining unit and thus that the employer is obligated to bargain exclusively with the representative. *See, e.g., N.L.R.B.* v. *Ralph Printing & Lithographing Co.*, 379 F.2d 687, 692-693 (8th Cir. 1967); *N.L.R.B.* v. *Clinton E. Hobbs Co.*, 132 F.2d 249, 251 (11th Cir. 1942).

Section 207(o)(2)(A)(i)'s use of the term "representatives" is sufficiently ambiguous that resort to the legislative history of the Section is required. *Cf. Int'l Ass'n of Fire Fighters* v. *West Adams County Fire Protection District*, Civil Action No. 87-F-16 at 5, fn. 2 (D. Colo. March 18, 1988). The legislative history makes clear that Congress intended Section 207(o)(2)(A)(i) to apply only where state law permits employees of state and local government entities to have recognized representatives. In its report on the 1985 FLSA amendments that created Section 207(o), the Senate Committee on Labor and Human Resources stated in regard to Section 207(o)(2)(A):

> Where employees have a recognized representative, the agreement, or understanding must be between

> that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.

S. Rep. No. 99-159, 99th Cong., 1st Sess. 10, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 658.

Plaintiffs rely on two cases that, to the contrary, hold that Section 207(o)(2)(A)(i) applies to any employee or group of employees who designates a representative to negotiate with the state or local governmental employer concerning the form in which overtime will be compensated, whether or not that representative is recognized. *See Jacksonville Professional Fire Fighters Ass'n* v. *Jacksonville*, 685 F. Supp. 513 (E.D.N.C. 1987); *Dillard* v. *Harris*, No. C86-834A (N.D.Ga. Sept. 30, 1987). The Court does not find these cases persuasive. These cases fail to address the Senate Committee report and instead look to two sources outside of the legislative history in reaching their holdings. The first is the Department of Labor's interpretation of Section 207(o)(2)(A) found at 29 C.F.R. § 553.22. That regulation reads in part:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

24 C.F.R. § 553.22(b)(1) (1987). The second source is a 1986 letter from several Congressmen who had sponsored the 1985 FLSA amendments to then Secretary of Labor Brock, expressing their approval of the Department of Labor's interpretation:

> We were careful in developing the amendment to be clear that the representative need not be a formally

> recognized collective bargaining representative and that recognition by the employer was not required.
>
> • • • •
>
> It is the employees' designation, and not the employer's recognition or attitude toward that representative that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirements of formal recognition.

Letter from Congressional Sponsors of the Fair Labor Standards Amendments of 1985 to Secretary of Labor William E. Brock at 2 (Sept. 26, 1986). If the Senate Committee report did not address Congress' intent concerning Section 207(o)(2)(A), these two sources would have interpretive value. However, the Senate Committee report speaks clearly and to the contrary of these sources. As legislative history, the Senate Committee's interpretation of Section 207(o)(2)(A) must prevail over the Department of Labor's interpretation and a post-enactment attempt by several Congressmen to place their own gloss on the statute.

The Court need not pause long over the fact that Section 207(o)(2)(A)(i) provides that an agreement under that subsection can be reached by means of a "memorandum of understanding or any other agreement" as well as by means of a collective bargaining agreement. Here again, the Senate Committee report is helpful. Concerning the form that a Section 207(o)(2)(A)(i) agreement is to take, the report states that "[t]he agreement or understanding need not be in writing, but a record of its existence must be kept." Senate Committee Report at 10, 1985 U.S. Code Cong. & Admin. News at 658. This statement indicates that Congress intended by this language to avoid restricting the form in which Section 207(o)(2)(A)(i) agreements were made rather than to describe the type of representative that was permitted to enter into such agreements. Thus, based on the legisla-

tive history of Section 207(o)(2)(A), the Court holds that a Section 207(o)(2)(A)(i) agreement is only required where state law permits state and local governmental entities to recognize representatives of their employees for collective bargaining purposes.

Plaintiffs also argue that Virginia law permits the City to reach a Section 207(o)(2)(A)(i) agreement with Abbott, LaPorta and Sitarski. While plaintiffs concede that municipalities in Virginia are prohibited from collectively bargaining with their employees, they assert that Virginia law allows Abbott, LaPorta and Sitarski to represent the 253 police officers to the extent necessary to make a Section 207(o)(2)(A)(i) agreement. This argument fails for two reasons. First, as discussed above, Congress intended Section 207(o)(2)(A)(i) to apply only where a state or local government entity is permitted to enter into a collective bargaining agreement with recognized representatives of its employees. Plaintiffs admit that such is not the case in Virginia. Second, even if Section 207(o)(2)(A)(i) could be read to permit an agreement in states that would allow "recognition" for purposes of that subsection but not for collective bargaining purposes, Virginia law would appear to prohibit such recognition by the City. Plaintiffs rely for their argument on *O'Brien* v. *Leidinger*, 452 F. Supp. 720 (E.D. Va. 1978). Yet *O'Brien* merely holds that Virginia law permits municipalities to "legally enter into 'discussions' concerning wages, hours and working conditions with representatives of public employee organizations." *Id.* at 723 (footnote omitted). Section 207(o)(2)(A)(i) mandates more than just discussions: it plainly requires that an agreement be struck between the state or local governmental entity and representatives of its employees.

As mentioned above, *Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 232 S.E.2d 30 (1977), the seminal Virginia case on collective bargaining by employees of municipalities, held that local governing bodies

cannot enter into collective bargaining agreements with exclusive bargaining agents of their employees concerning terms and conditions of employment. In reaching this conclusion, the Virginia Supreme Court relied on the Dillon Rule of strict construction of local government powers to find that since the Virginia legislature had not expressly or by necessary implication granted local governing bodies the power to enter into collective bargaining agreements with representatives of their employees, local governing bodies had no such power. *Id.* at 42-44.

The Virginia legislature has not expressly or impliedly granted the City, either by statute or by the City's charter, the power to enter into any type of agreement with representatives of its employees concerning compensation. Therefore, the Court is of the opinion that if faced with the present issue, the Virginia Supreme Court would hold that a municipality such as the City is prohibited from "recognizing" a representative of its employees even for the limited purposes of reaching a Section 207(o)(2)(A)(i) agreement.

Plaintiffs do not argue that the City's policy from April 1, 1986 to January 21, 1988 did not comport with Section 207(o)(2)(A)(ii)'s requirement that "an agreement or understanding [be] arrived at between the employer and employee before the performance of work . . ." nor does it appear that the City's policy of giving each individual police officer the choice as to how he would be compensated for a specific overtime period violated this provision. Accordingly, the Court holds that the City's policy from April 1, 1986 to January 21, 1988 was in compliance with Section 207(o)(2)(A).

For the foregoing reasons, the City's Motion for Partial Summary Judgment is GRANTED, and plaintiffs' Motion for Summary Judgment is DENIED as to the issue of whether the City violated Section 207(o)(2)(A).

Counsel are DIRECTED to advise the Court within ten (10) days whether there are claims left unresolved after this opinion and if so whether they wish to pursue them.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ J. Cavitt Clarke
United States District Judge

Norfolk, Virginia

July 22, 1988

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*
*Plaintiffs,*

v.

THE CITY OF VIRGINIA BEACH
*Defendant.*

ORDER

Upon the motion of both parties, and pursuant to the submission of the parties and the Court's earlier Order of July 22, 1988, it is hereby

ORDERED that—

(1) Plaintiffs' claims supported by Complaint paragraphs 6 through 8, 11 through 13, 16 through 18, 21, 28 through 31, and 33, with regard to whether defendant violated Section 207(o)(2)(A) by establishing a system of compensatory time in lieu of cash overtime are dismissed in favor of defendant pursuant to the Court's July 22, 1988 Grant of Partial Summary Judgement; and

(2) all other claims of plaintiff are dismissed with prejudice under Federal Rules of Civil Procedures 41(a), on the basis of the parties' settlement agreement attached hereto.

ENTERED:

Oct. 25, 1988

/s/ J. Cavitt Clarke
United States District Judge

WE MAKE SO:

/s/ Michael T. Leibig
MICHAEL T. LEIBIG
Attorney for Plaintiffs

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SEEN AND AGREED TO:

/s/ Randall Blow
RANDALL BLOW, Esquire
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 87-885-N

TOM ABBOTT, *et al.*
*Plaintiffs,*

v.

THE CITY OF VIRGINIA BEACH
*Defendant.*

# SETTLEMENT AGREEMENT

This agreement constitutes a final and complete settlement of all issues raised by the above-captioned case beyond the 29 U.S.C. Section 207(o)(2)(A) issue which was subject to Partial Summary Judgment on July 22, 1988. Plaintiffs preserve their right to appeal the Partial Summary Judgment Order.

I. *Dismissal With Prejudice.*

The parties will file a joint request for dismissal with prejudice under Rule 41(a) of the Federal Rules of Civil Procedure incorporating by reference the following settlement. The total monetary cost of the settlement is to be paid by defendant in complete discharge of all claims not covered by the July 22, 1988 Order.

II. *Future Relief.*

A. *Exemption of Sergeants.* Defendant agrees to treat police sergeants as non-exempt under the FLSA.

B. *Compensatory Time.* Defendant has adopted an overtime policy which provides for the award of compensatory time. This policy has an effective date of November 1, 1988.

C. *Work Time and Regular Rate.* Defendant agrees to comply fully with all work time and regular rate provisions of the Fair Labor Standards Act, 29 U.S.C. Section 201, *et seq.*, including all Department of Labor regulations on work time and calculation of the regular rate.

III. *Back Pay Monetary Settlement.*

A. *Back Pay.* In accordance with 29 U.S.C. Section 216(b), plaintiffs will be paid $12,413.62 as liquidated damages arising out of earlier inincentive pay adjustments as outlined in Attachment A.

B. *Compensatory Time Accrued By Sergeants.* All plaintiffs who served as sergeants between April 16, 1986 and January 21, 1988, will be credited with additional hours of compensatory time too as set forth in Attachment B.

C. *Attorneys Fees and Costs.* Defendants shall pay plaintiffs' reasonable attorneys fees and costs to Zwerdling, Paul, Leibig, Kahn & Thompson, P.C. in the amount of $18,415. These fees constitute approximately 50% of the total costs and fees incurred by plaintiffs through July 31, 1988. The parties agree that the attorney's fees and costs settlement reflects only plaintiffs' reasonable fees and costs relating to issues raised by the case other than the compensatory time issue which is the subject of the Court's July 22, 1988 Order granting Defendants' Partial Summary Judgment on the compensatory time issue. Plaintiffs retain their right to seek the remainder of the fees and costs in the event that they are ultimately successful, after appeal, on the compensatory time issue.

D. *No Other Payments.* These payments total $30,828.62. They will be made no later than October 31, 1988. No additional payments will be made of any kind. These payments constitute a complete settlement of all claims under the FLSA and this case other than those which may arise out of any successful appeal of the Court's July 22, 1988 Order. No liquidation or interest beyond these figures will be paid.

IV. *Complete and Final Settlement.* This agreement is a complete and final settlement of all issues outside those covered by the July 22, 1988 Order.

REVIEWED AND AGREED TO:

/s/ Michael T. Leibig
MICHAEL T. LEIBIG
Zwerdling, Paul, Leibig,
Kahn & Thompson, P.C.
1025 Connecticut Avenue, N.W.
Washington, DC 20036

/s/ Randall M. Blow
RANDALL M. BLOW
Assistant City Attorney
City of Virginia Beach
Municipal Center
VA Beach, VA 23456

ATTACHMENT A

| PLAINTIFF | EDUCATIONAL INCENTIVE PAY ADJUSTMENT |
|---|---|
| Tom Abbott | 73.52 |
| Frank La Porta | 565.06 |
| Nicholas Sitarski | 47.16 |
| John L. Bell, Jr. | 55.71 |
| David E. Boyd | 0.00 |
| Charles J. Condon | 0.00 |
| Dennis Free | 312.62 |
| James Howland | 106.11 |
| Daniel Kappers | 266.22 |
| J. G. Malesky | 129.92 |
| Joseph M. Patterson | 98.58 |
| R. F. Stange | 146.72 |
| R. T. Talbot | 111.07 |
| Grant L. Wylie | 0.00 |
| D. G. Adams | 0.00 |
| F. C. Adams, Jr. | 25.86 |
| R. J. Bach | 248.53 |
| L. M. Campbell | 0.00 |
| K. C. Emrich | 101.17 |
| R. D. Hatfield | 0.00 |
| M. J. Marshall | 147.75 |
| D. A. Painter | 210.34 |
| M. W. Stroud | 0.00 |
| R. G. Bach | 148.42 |
| D. B. Backman | 453.95 |
| W. D. Barnette | 0.00 |
| G. A. Barone | 0.00 |
| S. A. Barone | 21.18 |
| A. J. Bell | 126.30 |
| P. J. Bender | 460.52 |
| R. W. Bishop, Jr. | 0.00 |
| J. T. Blatt | 0.00 |
| J. M. Borman | 0.00 |
| R. K. Bousman, III | 52.32 |
| W. H. Boyden | 0.00 |
| J. A. Calvert, Jr. | 76.70 |
| D. L. Campbell | 131.95 |
| D. J. Campbell | 293.12 |
| M. E. Campbell | 94.83 |
| R. L. Christian, III | 48.53 |
| Lucian Colley | 0.00 |
| Michael Collins | 101.76 |
| L. D. Crisher | 124.27 |
| S. L. Crone | 0.00 |
| J. M. Curran, Sr. | 0.00 |

| PLAINTIFF | EDUCATIONAL INCENTIVE PAY ADJUSTMENT |
|---|---|
| D. L. Davis | 0.00 |
| M. A. Desantis | 0.00 |
| B. D. Dewan | 0.00 |
| Michael Dodson | 85.84 |
| T. P. Dugan | 0.00 |
| B. J. Eaton | 0.00 |
| M. L. Eller, Jr. | 252.40 |
| A. J. Elder | 0.00 |
| M. D. Faulkner | 0.00 |
| H. E. Fawley, Jr. | 567.34 |
| N. D. Ferguson, Jr. | 172.41 |
| R. G. Floyd | 28.20 |
| G. H. Fockler | 69.12 |
| Frank Genova | 113.24 |
| P. A. Gough | 0.00 |
| A. D. Hallingshead | 132.82 |
| D. D. Hammer | 190.72 |
| R. W. Hatfield | 0.00 |
| J. W. Hayden | 399.81 |
| T. D. Hayden | 255.97 |
| D. E. Hilton | 0.00 |
| J. N. Hoover | 146.91 |
| W. F. Huston, Jr. | 533.79 |
| J. Iman | 219.09 |
| D. L. Jackson | 0.00 |
| B. E. Johnson | 241.26 |
| J. V. Johnson | 0.00 |
| John Kelly | 275.21 |
| Michael Kennedy | 93.23 |
| Steven Kennedy | 99.90 |
| M. W. Kiefner | 0.00 |
| G. L. Knowles | 0.00 |
| S. D. Kurrle | 114.63 |
| G. W. Lawrence | 0.00 |
| J. V. Lindsay, III | 0.00 |
| T. J. Loftus | 62.49 |
| J. M. Macioce | 0.00 |
| Robert Manzione | 0.00 |
| R. L. Marson | 0.00 |
| R. W. Mathieson | 105.51 |
| D. W. Matson | 0.00 |
| T. M. McCarthy | 0.00 |
| J. C. McDonald | 311.78 |
| J. M. McElligott | 215.76 |
| J. A. McLuckie | 355.15 |
| R. P. Mike | 69.53 |

| PLAINTIFF | EDUCATIONAL INCENTIVE PAY ADJUSTMENT |
|---|---|
| K. A. Miller | 138.12 |
| W. T. Moran, III | 0.00 |
| M. G. Moseley | 0.00 |
| T. D. Murphy | 0.00 |
| W. J. O'Keefe | 176.34 |
| Joseph Perez | 0.00 |
| M. J. Peterson | 0.00 |
| R. A. Polizzi | 0.00 |
| R. C. Provo | 0.00 |
| R. S. Renner | 182.70 |
| W. B. Robertson | 0.00 |
| G. D. Roland | 276.56 |
| A. J. Rombs | 0.00 |
| M. P. Ronan | 89.64 |
| B. J. Ruby | 86.61 |
| R. R. Sager, Jr. | 0.00 |
| M. D. Sanderson | 0.00 |
| E. C. Seiderman | 0.00 |
| J. R. Sherwood | 0.00 |
| J. K. Slayton | 0.00 |
| A. Sokolik | 0.00 |
| J. B. Spry | 0.00 |
| T. R. Steele | 0.00 |
| W. K. Stewart | 0.00 |
| H. C. Tatum, III | 152.54 |
| J. M. Tegeler | 0.00 |
| A. A. Turner | 0.00 |
| E. Upchurch | 46.69 |
| J. E. Walters, Jr. | 24.00 |
| T. E. Warford | 157.61 |
| J. P. Werele, III | 192.56 |
| R. D. Whitehurst | 0.00 |
| D. M. Williams | 531.66 |
| E. V. Wilson | 85.45 |
| J. L. Wood | 143.55 |
| P. C. Yoakum | 0.00 |
| R. J. Zeltmann | 177.29 |

ATTACHMENT B

VIRGINIA BEACH POLICE DEPARTMENT
COMPENSATORY TIME ACCRUED BY POLICE SERGEANTS

April 16, 1986-January 21, 1988

Bell, John L.—Date of Promotion 09-01-86

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 09-17-86 | 6.25 | 03-11-87 | .50 |
| 09-18-86 | 2.00 | 03-18-87 | .50 |
| 10-01-86 | 1.50 | 04-01-87 | 3.50 |
| 10-03-86 | 2.00 | 04-08-87 | 3.50 |
| 10-06-86 | 2.00 | 04-22-87 | 5.00 |
| 10-08-86 | 4.50 | 05-04-87 | 2.00 |
| 10-10-86 | 2.25 | 05-05-87 | 3.00 |
| 10-15-86 | 1.00 | 05-06-87 | 1.25 |
| 10-22-86 | 4.00 | 05-12-87 | 6.50 |
| 10-23-86 | 2.00 | 05-13-87 | 4.25 |
| 10-29-86 | 4.00 | 05-20-87 | 2.00 |
| 11-12-86 | 3.00 | 05-21-87 | 2.00 |
| 11-17-86 | 2.00 | 05-27-87 | 2.00 |
| 11-19-86 | 4.50 | 06-03-87 | 1.00 |
| 11-26-87 | 2.00 | 06-10-87 | 3.50 |
| 12-03-86 | 4.50 | 06-16-87 | 2.00 |
| 12-10-86 | 3.50 | 06-17-87 | 1.75 |
| 12-17-86 | 2.00 | 06-19-87 | 2.00 |
| 12-24-86 | 1.00 | 06-24-87 | 5.25 |
| 01-07-87 | 2.50 | 06-26-87 | 2.00 |
| 01-12-87 | 3.00 | 07-14-87 | 3.00 |
| 01-14-87 | 1.50 | 07-22-87 | 8.00 |
| 02-04-87 | 3.50 | 07-28-87 | 2.00 |
| 02-11-87 | 4.50 | 08-04-87 | 2.00 |
| 02-18-87 | 2.50 | 08-05-87 | 2.00 |
| 02-25-87 | 12.75 | 09-02-87 | 3.00 |
| 03-04-87 | 8.00 | Total | 165.75 |

Boyd, David E.—Date of Promotion 03-16-86

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 06-11-86 | 1.00 | 12-10-86 | 3.00 |
| 06-18-86 | 8.00 | 12-17-86 | 3.00 |
| 06-25-86 | 3.00 | 12-31-86 | 2.00 |
| 07-02-86 | 2.00 | 01-07-87 | 2.00 |
| 07-09-86 | 1.50 | 01-21-87 | 3.00 |
| 07-16-86 | 1.50 | 01-28-87 | 3.50 |
| 08-20-86 | 4.00 | 02-04-87 | 2.00 |
| 09-03-86 | 2.00 | 02-11-87 | 7.00 |
| 09-10-86 | 2.00 | 02-25-87 | 3.50 |
| 09-17-86 | 4.00 | 03-18-87 | 2.50 |
| 09-23-86 | 6.00 | 03-25-87 | 8.00 |
| 10-01-86 | 7.00 | 04-08-87 | 2.00 |
| 10-08-86 | 9.50 | 04-22-87 | 3.25 |
| 10-15-86 | 10.50 | 05-06-87 | 3.00 |
| 10-22-86 | 14.00 | 06-10-87 | 1.50 |
| 10-29-86 | 5.00 | 06-24-87 | 2.00 |
| 11-05-86 | 1.50 | 07-22-87 | 4.00 |
| 11-11-86 | 3.00 | 07-25-87 | 16.00 |
| 11-19-86 | 2.00 | Total | 174.75 |
| 12-02-86 | 16.00 | | [87.5] |

Condon, Charles J.—Date of Promotion 01-01-86

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 04-17-86 | 2.00 | 12-23-86 | 4.50 |
| 04-23-86 | 1.00 | 01-19-87 | 8.00 |
| 04-28-86 | 2.00 | 01-21-87 | 3.75 |
| 05-06-86 | 2.00 | 02-01-87 | 2.50 |
| 05-12-86 | 2.00 | 02-18-87 | 8.75 |
| 05-20-86 | 3.00 | 02-25-87 | 2.00 |
| 05-22-86 | 2.00 | 03-04-87 | 8.00 |
| 05-23-86 | 4.00 | 03-11-87 | 2.00 |
| 05-28-86 | 2.00 | 03-18-87 | 1.00 |
| 06-03-86 | 2.00 | 03-24-87 | 2.00 |
| 06-11-86 | .75 | 04-15-87 | 2.50 |
| 06-16-86 | .50 | 04-27-87 | 2.00 |
| 06-17-86 | 2.00 | 04-29-87 | 2.00 |
| 06-18-86 | 2.00 | 05-14-87 | 3.50 |
| 06-24-86 | 2.75 | 05-27-87 | 2.00 |
| 07-02-86 | 2.00 | 06-11-87 | 2.00 |
| 07-09-86 | 3.00 | 06-16-87 | 2.00 |
| 07-15-86 | 2.00 | 07-02-87 | 2.00 |
| 07-29-86 | 2.00 | 07-08-87 | .50 |
| 07-30-86 | 1.00 | 07-15-87 | 2.00 |
| 08-05-86 | 2.00 | 07-16-87 | 2.00 |
| 08-12-86 | 3.50 | 07-22-87 | 2.00 |
| 08-13-86 | 1.00 | 08-04-87 | 2.00 |
| 08-19-86 | 2.00 | 08-19-87 | 2.00 |
| 08-20-86 | 3.75 | 08-20-87 | 3.25 |
| 09-12-86 | 3.25 | 08-27-87 | 2.00 |
| 09-17-86 | 4.00 | 10-21-87 | 2.00 |
| 09-24-86 | 2.00 | 10-26-87 | 4.50 |
| 09-30-86 | 2.50 | 10-28-87 | 2.50 |
| 10-21-86 | 2.00 | 11-23-87 | 2.00 |
| 10-22-86 | .50 | 11-25-87 | 2.00 |
| 10-28-86 | 2.00 | 11-30-87 | 2.00 |
| 10-29-86 | 2.00 | 12-09-87 | 2.00 |
| 11-05-86 | 1.00 | 12-21-87 | 2.00 |
| 11-19-86 | 4.00 | 12-23-87 | 3.00 |
| 11-24-86 | 2.00 | 01-20-88 | .75 |
| 12-09-86 | 2.00 | Total | 178.50 |
| | | | [89.5] |

Curran, Joseph M., Sr.—Date of Promotion 10-01-74

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 08-06-86 | 3.50 | 08-05-87 | 2.50 |
| 11-08-86 | 8.00 | 09-30-87 | 5.00 |
| 01-25-87 | 5.50 | 11-25-87 | 4.00 |
| 04-22-87 | 5.00 | Total | 33.50 |

[17]

Free, Dennis E.—Date of Promotion 06-16-85

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 04-18-86 | 2.00 | 02-18-87 | 1.00 |
| 04-29-86 | 2.00 | 03-11-87 | 8.00 |
| 05-15-86 | 2.00 | 04-08-87 | 18.00 |
| 07-11-86 | 2.00 | 05-20-87 | 8.00 |
| 07-16-86 | 1.00 | 06-03-87 | 4.50 |
| 07-22-86 | 2.00 | 06-17-87 | 4.00 |
| 09-29-86 | 2.00 | 07-08-87 | 2.00 |
| 10-06-86 | 3.00 | 08-19-87 | 8.00 |
| 10-17-86 | 2.00 | 09-02-87 | 17.50 |
| 10-21-86 | 3.00 | 09-16-87 | 12.00 |
| 10-22-86 | 2.00 | 10-14-87 | 1.00 |
| 10-27-86 | 2.00 | 12-23-87 | 3.50 |
| 11-09-86 | 2.00 | Total | 116.50 |
| 11-14-86 | 2.00 | | [58.5] |

Howland, James E.—Date of Promotion 09-16-80

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 05-11-86 | 3.00 | 08-13-86 | 2.50 |
| 05-13-86 | 1.00 | 09-10-86 | 10.00 |
| 05-14-86 | 1.00 | 09-17-86 | 2.50 |
| 05-15-86 | 1.00 | 09-16-87 | 5.00 |
| 05-16-86 | 1.00 | Total | 46.50 |
| 07-16-86 | 19.50 | | [23.5] |

Kappers, Daniel H.—Date of Promotion 07-01-78

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 08-19-87 | 3.00 | 10-28-87 | 3.00 |
| 09-02-87 | 10.00 | 11-11-87 | 6.50 |
| 09-30-87 | 3.00 | 11-25-87 | 9.00 |
| 10-14-87 | 8.50 | Total | 43.00 |
| | | | [21.5] |

Malesky, Joseph G.—Date of Promotion 03-01-77

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 01-14-87 | 2.00 | 05-06-87 | .50 |
| 02-11-87 | 2.50 | 10-28-87 | 5.00 |
| 03-04-87 | 2.00 | 11-25-87 | 1.50 |
| 03-11-87 | .50 | Total | 22.50 |
| 04-08-87 | 8.50 | | [11.5] |

Patterson, Joseph M.—Date of Promotion 09-16-80

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 07-23-86 | 2.50 | 01-28-87 | 2.00 |
| 08-06-86 | .50 | 03-17-87 | 2.00 |
| 08-20-86 | 2.75 | 04-22-87 | 3.50 |
| 08-27-76 | .50 | 05-06-87 | .50 |
| 09-01-86 | 8.00 | 05-27-87 | 2.00 |
| 09-03-86 | 2.00 | 06-03-87 | 1.50 |
| 09-10-86 | 3.00 | 07-03-87 | 1.50 |
| 10-15-86 | 1.00 | 07-08-87 | 1.00 |
| 11-19-86 | 3.50 | 07-22-87 | 3.00 |
| 12-10-86 | 3.50 | 08-05-87 | 1.00 |
| 12-24-86 | 4.25 | 10-28-87 | 2.00 |
| 01-07-87 | 2.50 | 11-25-87 | 2.50 |
| 01-14-87 | 1.50 | 12-09-87 | 1.00 |
| 01-19-87 | 5.00 | 01-18-88 | 8.00 |
| 01-21-87 | 2.00 | Total | 74.00 |

[37]

Sitarski, Nicholas S.—Date of Promotion 12-01-78

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 04-16-86 | .50 | 04-01-87 | 6.00 |
| 04-21-86 | 8.00 | 04-08-87 | 2.00 |
| 04-29-86 | 2.00 | 05-20-87 | 1.00 |
| 05-02-86 | 5.00 | 06-10-87 | 1.00 |
| 06-11-86 | 3.00 | 06-17-87 | 10.50 |
| 07-23-86 | .50 | 06-24-87 | 8.50 |
| 07-26-86 | 3.00 | 07-03-87 | .75 |
| 08-13-86 | 7.00 | 07-08-87 | 9.00 |
| 09-10-86 | 4.75 | 07-22-87 | 1.00 |
| 10-01-86 | 7.50 | 08-05-87 | 2.00 |
| 10-08-86 | 2.00 | 08-19-87 | 1.00 |
| 10-29-86 | 1.00 | 09-02-87 | 1.50 |
| 11-09-86 | 3.50 | 10-14-87 | 2.50 |
| 12-03-86 | 1.00 | 11-11-87 | 19.50 |
| 12-10-86 | 2.00 | 11-25-87 | 4.50 |
| 02-16-87 | 8.00 | 12-09-87 | 1.50 |
| 02-18-87 | 2.00 | 12-23-87 | 1.50 |
| 03-18-87 | 2.00 | Total | 147.00 |
| 03-25-87 | 10.50 | | [73.5] |

Stange, Robert F.—Date of Promotion 08-01-79

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 05-19-86 | 3.00 | 06-10-87 | 2.00 |
| 06-18-86 | 2.00 | 06-24-87 | 2.00 |
| 07-23-86 | 1.50 | 07-22-87 | 1.75 |
| 03-18-87 | 2.25 | 01-20-88 | .50 |
| 04-22-87 | .50 | Total | 17.50 |
| 05-27-87 | 2.00 | | [9.0] |

Talbot, Richard T.—Date of Promotion 12-01-81

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 07-09-86 | 1.00 | 05-27-87 | 2.00 |
| 07-23-86 | 2.00 | 06-17-87 | .50 |
| 12-21-86 | 1.00 | 07-22-87 | 1.50 |
| 02-11-87 | 1.00 | 08-05-87 | 8.00 |
| 03-11-87 | 4.00 | 12-01-87 | 1.00 |
| 04-08-87 | 1.00 | Total | 23.00 |
| | | | [11.5] |

Wylie, Grant L.—Date of Promotion 01-01-86

| Date Earned | Amount Earned | Date Earned | Amount Earned |
|---|---|---|---|
| 05-15-86 | 4.00 | 06-10-87 | .50 |
| 09-23-86 | 14.00 | Total | 20.50 |
| 11-12-86 | 2.00 | | [10.5] |

## APPENDIX D

### 29 U.S.C. §207(o)(1)-(2)

§ 207. Maximum hours.

* * *

(o) (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A) (ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in

lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

## APPENDIX E

### 29 C.F.R. § 553.23

§ 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7 (o) (2) (A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must, be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all employees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation

may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

## APPENDIX F

**52 Fed. Reg. 2014-15 (January 16, 1987)**

*Section 7(o) Compensatory Time and Compensatory Time Off.*

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*Section 553.23 Agreement or understanding prior to performance of work.*

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

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Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23 (b)(i), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would re-

quire a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(i) should operate only where collective bargaining obligations are provided for by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggest that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative

of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA Section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

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